

VOTE ON H. CON. RES. 119

I ask for the yeas and nays, and I yield back all remaining time on both sides.

The PRESIDING OFFICER. Without objection, all time is yielded back.

Is there a sufficient second?

There appears to be a sufficient second.

The clerk will call the roll.

The legislative clerk called the roll.

Mr. DURBIN. I announce that the Senator from New Jersey (Mr. BOOKER), the Senator from Connecticut (Mr. MURPHY), and the Senator from Georgia (Mr. WARNOCK) are necessarily absent.

Mr. THUNE. The following Senators are necessarily absent: the Senator from North Carolina (Mr. BURR) and the Senator from Mississippi (Mrs. HYDE-SMITH).

The result was announced—yeas 52, nays 43, as follows:

[Rollcall Vote No. 371 Leg.]

## YEAS—52

Baldwin	Hawley	Reed
Bennet	Heinrich	Rosen
Blumenthal	Hickenlooper	Rubio
Braun	Hirono	Sanders
Brown	Kaine	Schatz
Cantwell	Kelly	Schumer
Cardin	Kennedy	Shaheen
Carper	King	Sinema
Casey	Klobuchar	Smith
Coons	Leahy	Stabenow
Cortez Masto	Lujan	Tester
Cruz	Markey	Van Hollen
Duckworth	Menendez	Warner
Durbin	Merkley	Warren
Feinstein	Murray	Whitehouse
Gillibrand	Ossoff	Wyden
Graham	Padilla	
Hassan	Peters	

## NAYS—43

Barrasso	Hagerty	Romney
Blackburn	Hoeben	Rounds
Blunt	Inhofe	Sasse
Boozman	Johnson	Scott (FL)
Capito	Lankford	Scott (SC)
Cassidy	Lee	Shelby
Collins	Lummis	Sullivan
Cornyn	Manchin	Thune
Cotton	Marshall	Tillis
Cramer	McConnell	Toomey
Crapo	Moran	Tuberville
Daines	Murkowski	Wicker
Ernst	Paul	Young
Fischer	Portman	
Grassley	Risch	

## NOT VOTING—5

Booker	Hyde-Smith	Warnock
Burr	Murphy	

The PRESIDING OFFICER (Ms. CORTEZ MASTO). On this vote, the yeas are 52, the nays are 43.

Under the previous order requiring 60 votes for the adoption of this concurrent resolution, the concurrent resolution is not agreed to.

The concurrent resolution (H. Con. Res. 119) was rejected.

PROVIDING FOR A RESOLUTION WITH RESPECT TO THE UNRESOLVED DISPUTES BETWEEN CERTAIN RAILROADS REPRESENTED BY THE NATIONAL CARRIERS' CONFERENCE COMMITTEE OF THE NATIONAL RAILWAY LABOR CONFERENCE AND CERTAIN OF THEIR EMPLOYEES—Resumed

The PRESIDING OFFICER. Under the previous order, the Senate will resume consideration of H.J. Res. 100.

Under the previous order, the joint resolution is considered read a third time.

The joint resolution was ordered to a third reading and was read the third time.

VOTE ON H.J. RES. 100

The PRESIDING OFFICER. The joint resolution having been read the third time, the question is, Shall the joint resolution pass?

Mrs. MURRAY. Madam President, I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second?

There appears to be a sufficient second.

The clerk will call the roll.

The senior assistant legislative clerk called the roll.

Mr. DURBIN. I announce that the Senator from Connecticut (Mr. MURPHY) and the Senator from Georgia (Mr. WARNOCK) are necessarily absent.

Mr. THUNE. The following Senators are necessarily absent: the Senator from North Carolina (Mr. BURR) and the Senator from Mississippi (Mrs. HYDE-SMITH).

The result was announced—yeas 80, nays 15, as follows:

[Rollcall Vote No. 372 Leg.]

## YEAS—80

Baldwin	Graham	Padilla
Barrasso	Grassley	Peters
Bennet	Hassan	Portman
Blackburn	Heinrich	Reed
Blumenthal	Hirono	Risch
Blunt	Hoeben	Romney
Booker	Inhofe	Rosen
Boozman	Johnson	Rounds
Braun	Kaine	Sasse
Brown	Kelly	Schatz
Cantwell	Kennedy	Schumer
Capito	King	Shaheen
Cardin	Klobuchar	Shelby
Carper	Lankford	Sinema
Casey	Leahy	Smith
Cassidy	Lee	Stabenow
Coons	Lujan	Tester
Cornyn	Lummis	Thune
Cortez Masto	Manchin	Tillis
Cramer	Markey	Tuberville
Crapo	Marshall	Van Hollen
Daines	McConnell	Warner
Duckworth	Menendez	Whitehouse
Durbin	Moran	Wicker
Ernst	Murkowski	Wyden
Feinstein	Murray	Young
Fischer	Ossoff	

## NAYS—15

Collins	Hawley	Scott (FL)
Cotton	Hickenlooper	Scott (SC)
Cruz	Merkley	Sullivan
Gillibrand	Rubio	Toomey
Hagerty	Sanders	Warren

ANSWERED "PRESENT"—1

Paul

NOT VOTING—4

Burr	Murphy
Hyde-Smith	Warnock

The ACTING PRESIDENT pro tempore. On this vote, the yeas are 80, the nays are 15. One Senator responded present.

Under the previous order requiring 60 votes for the passage of this joint resolution, the joint resolution is passed.

The joint resolution (H.J. Res. 100) was passed.

The ACTING PRESIDENT pro tempore. The Senator from Texas.

UNITED STATES V. TEXAS

Mr. CORNYN. Madam President, earlier this week, I did something I haven't done in a number of years, which is to attend a session of the U.S. Supreme Court, their oral arguments.

Of course, as you know, during the COVID pandemic, even the Supreme Court had to change the way it operated, but now the Court is back in the Supreme Court Building, meeting together, and listening to oral arguments and deciding some of the most important cases that are confounding the country and our legal system.

But the case that I listened to oral arguments in hit very close to home because the style of the case was *United States v. Texas*. It centers on a memo issued by the Department of Homeland Security Secretary, Alejandro Mayorkas, which he released last fall. In it, he provided specific confirmation—indeed, actually direction—to our Border Patrol agents that they would no longer have any hard and fast rules when it comes to removing illegal entry into the United States, particularly by those who commit serious crimes. So rather than a mandatory rule, Secretary Mayorkas said: Well, you have to weigh these various factors to see whether somebody who is guilty of a serious crime should be removed from the United States.

Under this memorandum, officers with Immigration and Customs Enforcement were discouraged from arresting or removing illegal immigrants unless they posed a threat to national security, public safety, or border security. That sounds reasonable, but it is a little more amorphous, a little more vague than specifically people who have committed aggravated felonies.

The memorandum, though, goes on to say that the Agency will prioritize anyone who poses a "current threat to public safety," but it is unclear exactly what that means. The guidelines state that this "is not to be determined according to bright lines or categories."

If you are a law enforcement officer, like the Border Patrol, what do you want? You want bright lines. You don't want categories. You don't want some woke statement about, well, on one hand, you have to consider these factors; on the other hand, you have to consider these factors. They need bright lines so they can make, perhaps, even life-and-death decisions.

But what Secretary Mayorkas has said in this memorandum is that there

is really no clear guidance, no clear definition for our Border Patrol in terms of the people they need to detain and remove from the United States because they are a public safety threat. I would hope that crimes like murder, rape, and aggravated assault would meet this balancing test by Secretary Mayorkas, but the memo does not offer any specifics. It is, on this hand, you have to consider these factors; on the other hand, you have to consider these without any real guidance.

We know it is unfair to our law enforcement officials to not provide them with better guidance because they have to make difficult decisions—sometimes split-second decisions, sometimes life-and-death decisions. And to have somebody come back and say, “Well, you didn’t properly balance the considerations,” as opposed to having a bright line rule or category, which is less discretionary and which provides much more clarity and certainty, I think it is a disservice to them, as well.

What about domestic violence, what about child pornography, what about driving under the influence of alcohol, money laundering, embezzlement? You can look in this memorandum and you won’t find any answers to those questions, just the old balancing test: On the one hand, think about these things; on the other hand, think about those.

The administration has offered such vague guidance with the term “current threat to public safety” that different ICE officers may well reach different conclusions.

Making matters worse, the memo outlines mitigating factors. So not only do you consider these factors and these factors and balance them, then you need to consider mitigating factors that an officer should consider whether to enforce the law or simply walk away. This includes the age of the migrant, as well as how long they have been living in the United States, as if a migrant entering the country illegally somehow would acquire some equity or vested interest because they have been here longer than somebody else. That makes no sense at all.

The memorandum also said that the law enforcement officer must also include a consideration of the physical or mental condition of the migrant. It even directs ICE officers to consider how the removal of somebody illegally in the United States would impact other people and their family.

Just to be clear, these are not mandates from Congress. This is the product of a made-up memorandum by the Secretary of Homeland Security. Congress has given the Department the authority to exercise some prosecutorial decision, but there is a difference between prioritizing certain offenses for removal and effectively exempting entire categories for enforcement.

I think one of the problems that Secretary Mayorkas has is that he thinks he has the authority to pick and choose which laws to enforce. He has no such authority. Now, he does have

authority in terms of prioritizing them.

But, basically, he said that somebody who was in the country illegally because they violated immigration laws is the lowest of priorities for detention and removal. That is what gets you several million people over the last couple years. That is what gets you a border crisis, which allows for the illegal importation of the drugs that killed 108,000 Americans last year—that sort of wokeness and lawlessness.

We have seen previous administrations prioritize the removal of terrorists, transnational criminals, or people who pose a threat to public safety or national security, and that is fine. I think we can all agree that law enforcement should use its limited resources to address the biggest threats but not in the process exempt other people who have violated the law from any potential consequences. It defies all common sense to instruct a law enforcement officer to turn a blind eye when they encounter individuals who came here illegally and committed other crimes just because those crimes aren’t, in the opinion of Secretary Mayorkas, serious enough or because of the age of the individual or how long they have actually resided here in the United States.

The lower court, the District Court for the Southern District of Texas, found that Secretary Mayorkas’s memorandum guidance doesn’t justify common sense. They found that it breaks the law. Congress has provided the requirement and said that the Secretary “shall take into custody” non-citizens who commit certain crimes—“shall.”

The question Chief Justice Roberts kept asking is, Does “shall” mean “shall” or does “shall” mean “may,”—because the law, which Congress has passed and was signed by the President of the United States, says that you “shall take into custody” illegal immigrants who commit certain crimes and you “shall remove” those individuals once they are released from criminal custody. So the word “shall” is mandatory. It is not discretionary. Congress’s law that we passed isn’t just a polite suggestion. It is an instruction, it is a direction. It is a requirement. It is a mandate.

The reality of this situation, however inconvenient it may be for some of our colleagues, is that by entering the United States illegally, these individuals have, by definition, broken the law. The Secretary of Homeland Security doesn’t have the authority to determine whether those individuals should face the legal consequences that Congress has mandated. That is our job, and the decision was made long before President Biden or Secretary Mayorkas took office.

The State of Texas is disproportionately affected because we have a 1,200-mile common border with Mexico, and we are seeing the bulk of this wave of humanity and the drugs coming across

the border, and it has imposed a significant burden on our border communities and on our State.

But I believe that the State provided a strong case that the Justices should vacate this dangerous and illegal memo once and for all. If you think about it a minute, by saying, “Well, you have to weigh these factors against these factors and, oh, by the way, if somebody is of a certain age or has been here a while then you exclude them entirely,” what this memorandum did and does is sent a clear message to the world that if you come to the United States illegally, you will be able to stay as long as you don’t get caught committing a murder or some other heinous crime. But if you commit other crimes, you still might be released by the Department of Homeland Security because there is no bright line rule requiring removal under those circumstances.

This turns on its head what the obligation of the Secretary of Homeland Security should be. He takes an oath similar to the one we take to uphold the law, the Constitution and laws of the United States. I believe it is a clear violation of his oath and his responsibility to try to provide this watered-down memorandum. It is completely impossible for an individual Customs and Border Protection officer to know how they should strike the balance. It is going to be second-guessed.

As I said earlier, two Border Patrol agents looking at the same individual may weigh these factors differently. Well, it is contributing to the Biden border crisis that we have seen raging for the past 2 years. The United States, as we like to say, is a nation of laws, not men and women. In other words, it doesn’t depend on who you are. It depends on what the law is, and we all have the same obligation to follow the law. The Secretary simply doesn’t have the authority to cherry-pick which laws he wants to enforce and which ones he doesn’t.

Congress writes the laws, and the executive branch is charged with enforcing those laws as written, not as how you wish they would be—nothing more and nothing less. But, unfortunately, we have seen, time and time again—not for days, not for weeks, but for months and even now years—that the Biden administration has simply failed to clear this very low bar—enforce the law.

It is discouraging ICE personnel—again, ICE is Immigration and Customs Enforcement—from enforcing our immigration laws.

You remember that, a couple of years ago, some of the more radical members of our colleagues’ political party said: You should abolish ICE. We shouldn’t enforce any of our laws.

But the consequences are pretty clear now. They failed to secure the border or provide frontline law enforcement and agents with the resources they need in order to do their job. These can sometimes be very dangerous jobs.

What is more, the administration has actually sanctioned villainizing Border Patrol and ICE personnel for doing the very job that we asked them to do—enforcing our immigration laws.

Frequently, if you talk to the Border Patrol agents, they will talk about the push factors that encourage people to leave their home country, like poverty and violence. And then they talk about the pull factors, or what they can expect to encounter at the border as to discourage them from coming or to encourage them.

There has been no attempt by the Biden administration to address the pull factor that encourages people to make the dangerous trek from their homes and come to the United States illegally.

That would be something called deterrence, discouraging somebody from illegally coming to the country in the first place. And the asylum program, which has now resulted in millions of cases on the backlog of immigration courts, there has been no effort made to try to fix the broken asylum process, no attempt to strengthen law enforcement and to actually remove people who have no legal right to be here in the United States.

If you go to the border now—as I have been many times—and you talk to the Border Patrol agents, they will tell you that they routinely detain people from as many as 150 different countries. This isn't just people coming from Mexico or Central America; these are literally people coming from around the world. You will find Ukrainians. You will find Russians. You will find people from the Middle East. You will find people from Iran, North Korea, China.

The fact of the matter is that if you have enough money, if you are willing to pay the price that these human smugglers require, you can make your way into the United States and through our southern border illegally.

So it is an abdication of duty and a complete embarrassment to our law-abiding society. I think many Americans watch what is happening at the border, and they wonder, is this the same country I grew up in, or did I miss something? Because they feel like something has gone terribly awry with this sort of lawlessness and chaos.

The Biden administration's *laissez faire* attitude toward our Nation's immigration laws is absolutely disgraceful, and there must be consequences. The American people deserve better than this, and I hope to see more accountability next Congress once Republicans take control of the House.

That means that we will have new chairmen of the various committees, and they will call people like Secretary Mayorkas before those committees and hold them accountable. But until that happens, I don't expect things to get much better, because if the Biden administration hasn't been motivated to get off the dime and actually do something about this chaos and lawlessness

at the border, I don't know what it will take to change their minds.

But sometimes when public officials don't do what they are supposed to do and you can't change their minds, sometimes you need to change who those public officials are. Unfortunately, we may have to wait until the next election to do that.

Immigration enforcement is a bigger job today than it was a few years ago, and I am afraid it is getting ready to become even more challenging. Just last month, the DC district court judge vacated the Center For Disease Control's title 42 order, and the judge granted a 5-week stay which will expire here in less than 3 weeks.

Title 42—just to remind everybody—is a pandemic-related order designed to protect public health. It is not really an immigration order, but it is a public health order. So when people are coming across the border untested and unvaccinated, we recognize that is a potential to spread even more of the coronavirus.

And so Border Patrol has told me as long ago as about a year ago that they have been able to expel some people, particularly adult males, from coming across the border using the title 42 authority. But that is getting ready to go away in 5 weeks—or less than 3 weeks now.

And we have not heard any plan out of the Biden administration for how they are going to do the job without that authority, because they simply refuse to use any other authorities, like expedited removal, in order to discourage people from illegally entering the country.

Back when I sat down with some of the leaders of the Customs and Border Protection and Border Patrol, about a year ago now, they told me that once title 42 goes away, unless there is another alternative plan for controlling people's access to the border, they will lose control completely.

At this point, title 42 is one of the few remaining tools we have to prevent even more chaos at the border. Of the more than 230,000 encounters at the southern border in October, 230,000 migrants came to the border, more than 78,000 were removed under title 42.

You might ask what happened to the rest of them. Well, they were ushered into the country, perhaps never to be heard from again, based on weak asylum claims or other refusals by the Biden administration simply to enforce our immigration laws.

But 78,000 is not inconsequential. That is 78,000 people the Border Patrol didn't have to process, feed or house, or take care of. But once title 42 is gone, that will all change. And the consequences will be dire. It has been 2 weeks since the Federal judge struck down title 42, and I have yet to hear a peep out of the Biden administration about what they will do to address these consequences.

A few weeks ago, President Biden held a post-election press conference

and was asked what he intends to do differently over the next 2 years, given the fact that 75 percent of the voters say the country is headed in the wrong direction. He said: Nothing. He intends to do nothing differently.

Three out of four Americans believe the country is heading in the wrong direction, and the President of the United States of America says: I am not going to change the direction.

The Senate majority leader shared the same sentiment, calling the election results a vindication for Democrats. Given their recent comments, President Biden and Senator SCHUMER don't seem to recognize there is a problem at all. In fact, they seem happy with the way things are going, and they have assured us that Democrats are just going to keep moving in the same direction.

So if you think this is bad—and two-thirds of the voters believe we are headed in the wrong direction—just get ready, because it is about to get worse.

I yield the floor.

I suggest the absence of a quorum.

The ACTING PRESIDENT pro tempore. The clerk will call the roll.

The bill clerk proceeded to call the roll.

Mr. SCHUMER. Madam President, I ask unanimous consent that the order for the quorum call be rescinded.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

#### ORDER OF PROCEDURE

Mr. SCHUMER. I ask unanimous consent that all postcloture time on the Blackwell and Pryor nominations be considered expired; that the vote on confirmation of the Blackwell nomination occur at a time to be determined by the majority leader, following consultation with the Republican leader; and that the vote on the confirmation of the Pryor nomination occur at 5:30 p.m. on Monday, December 5.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

#### LEGISLATIVE SESSION

Mr. SCHUMER. Madam President, I move to proceed to legislative session.

The ACTING PRESIDENT pro tempore. The question is on agreeing to the motion.

The motion was agreed to.

#### EXECUTIVE SESSION

#### EXECUTIVE CALENDAR

The ACTING PRESIDENT pro tempore. I move to proceed to executive session to consider Calendar No. 1149.

The ACTING PRESIDENT pro tempore. The question is on agreeing to the motion.

The motion was agreed to.

The ACTING PRESIDENT pro tempore. The clerk will report the nomination.